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No. 270

# In the Supreme Court of the United States

OCTOBER TERM, 1959

CECIL W. ARMSTRONG, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-8a) is reported at 169 F. Supp. 259.

### JURISDICTION

The judgment of the Court of Claims was entered on January 14, 1959. A timely motion for rehearing was denied on May 13, 1959 (Pet. App. 9a). The petition for a writ of certiorari was filed on August 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

## QUESTION PRESENTED

Whether state-created materialmen's liens were acquired with respect to property supplied a Government contractor for performance of a Government contract where, in accordance with the contract, title to the property was transferred to the Government upon termination of the contract for default.

## STATEMENT

In March, 1954, the United States, through the Department of the Navy, entered into a contract with the Rice Shipbuilding Corporation, East Boothbay, Maine, for the construction of eleven personnel boats. The contract price for these boats was $175,900 (Pet. App. 1a-2a). The contractor commenced performance of the contract and, as the work progressed, the United States made progress payments to the contractor based upon estimated percentages of the work completed, less three percent retained percentages (Pet. App. 2a).

In August, 1955, the contractor was notified by letter that the United States had terminated the contract for default because of the failure to deliver the boats within the specified time and the failure to make satisfactory progress in performance of the contract.[1] The contractor was also informed that the United States would exercise its right under the contract to have the undelivered vessels completed by another shipbuilder, the excess costs of completion to be borne by the contractor. Finally, the contractor was, pursuant

[1] At the time of termination, one vessel had been completed and delivered to the Government, and the remaining ten vessels were in various stages of completion (Pet. App. 3a, n. 3).

to Clause 11(d) of the contract,[2] directed to transfer title to the Government of the partially completed vessels and certain manufacturing materials, and to deliver the vessels and materials to the Navy in the manner and at the time specified by the latter (Pet. App. 2a-3a).

The contractor on August 4, 1955, executed a document entitled "Instrument of Transfer of Title" by which the contractor's right, title and interest in the manufacturing materials were transferred as specified by the Government (Pet. App. 3a). The materials were thereafter removed by the Government from the State of Maine to naval shipyards at New York, Philadelphia, and Norfolk, where the materials were used in completing construction of the vessels (Pet. App. 3a).

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[2] Clause 11(d) provided as follows (App. 2a-3a):

If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. The Government shall pay to the Contractor the contract price for completed supplies delivered to and accepted by the Government, and the amount agreed upon by the Contractor and the Contracting Officer for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property. Failure to agree shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

Prior to termination of the contract, progress payments in the amount of $141,387.20 were made by the United States to the contractor (Pet. App. 3a). After termination, the cost of completing the boats was $166,627.34, exclusive of the materials transferred from the contractor (Pet. App. 3a). The added cost of completion of the boats resulted in the assessment of "excess costs" against the contractor in the amount of $146,470.28, no part of which has been paid, the contractor having been adjudicated bankrupt (Pet. App. 3a-4a).

Petitioners are unpaid suppliers of materials and equipment which, at the request of the contractor, they furnished in connection with the contractor's part performance of the Navy contract (Pet. App. 1a-2a). Petitioners brought an action in the Court of Claims seeking "just compensation" for the alleged taking, by the United States, of property rights consisting of statutory liens (assertedly acquired under Maine law on the materials supplied the contractor for performance of the contract and transferred to and removed by the United States upon termination of the contract (Pet. App. 1a, 4a).

On cross motions for summary judgment, the Government's motion was granted and petitioners' was denied (Pet. App. 8a). Relying on the general rule that "laborers and materialmen can acquire no lien on a Government work" (Pet. App. 5a), the Court of Claims held (Pet. App. 4a, 8a) that petitioners had acquired no compensable property rights which had been taken by the Government. The court held (Pet. App. 6a) that, under the rule of *United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452, the materialmen acquired no liens as against the United States

where, as here, the contract provided for passage of title to the Government upon the contractor's default. It rejected petitioners' contention that the rule prohibiting materialmen from acquiring liens on Government work is limited to cases where "title to the work rest[s] initially with the Government, or is acquired by it as the work progresses" (Pet. App. 5a-6a); and it ruled that, as it "interpret[ed]" "the provisions of the contract," the Government acquired "inchoate title" to the materials, and that "[i]n this sense the contract embraced a 'public work' which was beyond the reach of subcontractors' liens" (Pet. App. 8a).

ARGUMENT

Properly basing its decision on federal law (*United States* v. *Allegheny County*, 322 U.S. 174), the Court of Claims held that the subcontractors' liens, which might otherwise have arisen under Maine law[3] and which underlay petitioners' suits, did not and could not exist in the particular circumstances of this case, and that no valid claim under the Fifth Amendment was stated. The decision is correct and there is no con-

[3] Section 13, Chapter 178, Revised Statutes of Maine, 1954, provides as follows:

> Whoever furnishes labor or materials for building a vessel has a lien on it therefor, which may be enforced by attachment thereof within 4 days after it is launched; but if the labor and materials have been so furnished by virtue of a contract not fully completed at the time of the launching of the vessel, the lien may be enforced within 4 days after such contract has been completed. He also has a lien on the materials furnished before they become part of the vessel, which may be enforced by attachment, and the owners of any dry dock or marine railway used for any vessel have a lien on said vessel for the use of said dock or railway, to be enforced by attachment within 4 days after the last day in which the same is used or occupied by said vessel.

flict. There is no occasion for review by this Court.

In considering the validity of petitioners' materialmen's lien claims under Maine law, the Court of Claims was not dealing with the right of a state to provide for such liens where title to property supplied for the performance of a public contract is in the builder. The court, rather, was confronted with lien claims upon property to which the Government acquired title on August 4, 1955, when, pursuant to Clause 11(d) of the contract (*supra*, n. 2, p. 3), the prime-contractor executed the "Instrument of Transfer of Title" (Pet. App. 3a). It is, of course, settled that, for obvious reasons of public policy, property to which the Government has title "cannot be seized by authority of another sovereignty against the consent of the Government." *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452 at 471.

Consistent with this principle, this Court has on numerous occasions held that laborers or materialmen on Government contract projects cannot look to the United States for payment and can acquire no lien on a Government work.[4] The scope of the rule embraces new construction for the United States where actual title to parts and material does not vest in the Government until partial or progress payments are made or until there is a default by the contractor, as well as additions, repairs, or alterations of existing Government-owned property. *United States* v. *Ansonia Brass*, 218 U.S. 452, 470-471; cf. *United States* v. *Munsey*

[4] The governmental and public character of the subject matter of the Navy contract is hardly open to question. The personnel boats described in the contract were to be used aboard and in connection with the operation of combat vessels such as aircraft carriers, battleships, and cruisers (Pet. App. 2a, n. 1).

*Trust Co.*, 332 U.S. 234, 241, 244; *Equitable Surety Co. v. McMillan*, 234 U.S. 448, 455; *Hall v. American Surety Company of New York*, 200 U.S. 197, 203.

In rejecting petitioner's state-created lien claims, the court below gave full force and effect to these principles and to the relevant decisions of this Court. Starting with the premise (Pet. App. 5a) that "nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation" (*United States v. Munsey Trust Co.*, 332 U.S. 234, 241), the court looked to the terms of the construction contract between the United States and the shipbuilder. The contract, in Clause 11 (d), *supra*, n. 2, p. 3, makes express provision for the transfer of title to the United States of parts and materials acquired for the performance of the contract upon the happening of stated events prior to completion and acceptance of the vessels. Thus, upon termination for default the Government may require the contractor "to transfer title and deliver to the Government, * * * supplies and materials * * * specifically acquired for the performance" of the contract.

This title provision of the contract negates any intention on the part of the United States to recognize state-created lien rights, and places this case on a common footing with the *Bonnyard* contract considered by this Court in the *Ansonia Brass* case, *supra*, 218 U.S. at 464-472. In the *Bonnyard* contract, title was to pass as partial payments in the progress of the work were made; here, title was to pass upon termination for default. In *Ansonia Brass*, the Court held that state-created suppliers' liens could not subsist with respect to the 70 percent complete *Bonnyard* because, under

the construction contract, the builder's title to parts and materials furnished by suppliers was divested in favor of the Government as progress payments were made in the process of construction.[5] 218 U.S. at 470-471. Under this holding, the same result must follow where, as the contract in this case provides, title is transferred to the United States upon termination for the contractor's default.[6] The Court of Claims correctly so held. *Thomson Machine Works Co.* v. *Lake Tahoe Marine Supply Co.*, 135 F. Supp. 913 (N.D. Calif.).[7]

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[5] Only that part of the Court's opinion in *Ansonia Brass*, *supra*, which treats with the *Benguard* contract is pertinent here. For only with respect to the *Benguard* did the Government have and assert a claim to title based upon the contract. With respect to the other two vessels—the *Mohawk* and the *Galveston*—the Court considered only lien provisions based upon partial payments prior to completion of the vessels. (218 U.S. at 472, 474). As a matter of interpretation, the Court construed those contracts as recognizing that state-created liens could attach, and held that the Government's contract liens were not paramount.

[6] Petitioners would, apparently (Pet. 11-12), restrict the *Ansonia* decision, insofar as it relates to the *Benguard*, only to instances where title has passed to the United States in accordance with a progress payments clause of a contract (see Pet. App. 6a). This, as the Court of Claims held (Pet. App. 6a), is an unduly narrow interpretation of *Ansonia*. It would be incongruous if the applicability of state-created lien laws were to depend upon the mechanical question of whether title has passed to the Government under a progress payments clause or pursuant to a termination clause of the contract.

[7] There is another ground upon which the decision below, that there has been no compensable taking in this case, may be sustained. Under Section 31(b) of the contract and 34 U.S.C. (1952 Ed.) 582 (Pet. App. 6a-7a, n. 7), the progress payments in the amounts of $141,387.20 made to the contractor gave rise to a lien in favor of the Government that is paramount to "all other liens" (34 U.S.C. (1952 Ed.) 582). Thus, even if petitioners acquired a lien on the material and vessels, it was subordinate to the Government's lien.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1959.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1959 519328 3M